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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **ARMANDO GARCIA-WEHR,** **Defendant and Appellant.**	**A131547** **(Contra Costa County Super. Ct. No. 50901652)**

Appellant Armando Garcia-Wehr was sentenced to 40 years to life in prison after a jury convicted him of second degree murder with an enhancement for intentionally and personally discharging a firearm causing great bodily injury or death. (Pen. Code, §§ 187, subd. (a), 12022.53, subd. (d).) He contends the judgment must be reversed because: (1) the prosecutor used a peremptory challenge to excuse an African American juror in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); (2) the court did not adequately inquire about juror misconduct indicating bias; (3) the prosecutor committed misconduct in eliciting a reference to appellant's invocation of his right to remain silent under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) during cross-examination and in suggesting that the defense had influenced the testimony of an eyewitness; (4) the court should have given a sua sponte instruction that prior felony convictions were admissible only for impeachment and not as evidence of criminal propensity; (5) the court should not have instructed the jury on flight as showing consciousness of guilt; (6) CALJIC No. 2.21.2 deprived appellant of due process; (7) CALJIC No. 2.90 misstated the burden of proof

beyond a reasonable doubt; and (8) the cumulative effect of these errors requires reversal. We affirm.

FACTS

On the night of September 14, 2007, Walter McDuffie was fatally shot in the head while standing at the front door of Club Q, a nightclub in a strip mall in Antioch. People in the crowd outside the club immediately began to scatter and fanned out in different directions. Several Antioch Police Department officers were in the parking lot in their patrol cars, due to recent fights and disturbances at the club. Officer Chang was watching the front door from his patrol car when he heard a shot and saw McDuffie collapse.

Officer Chang and other officers secured the scene near the front door of the club. Chang then ran around the side of the club to East 16th Street to ask whether anyone had seen the shooting. He was approached by a witness, who had been outside the club smoking with his girlfriend when they heard a loud noise and started running like everyone else. The witness told Chang that he had seen a Hispanic man wearing a dark hoodie running eastbound on 16th Street, possibly carrying a backpack.[1]

Officer Harger and his police dog pulled up as the witness was telling Officer Chang about the man who was running. Harger drove up 16th Street searching for the suspect and saw appellant, who was wearing a dark hooded sweatshirt, running on the sidewalk at a "quickened pace run." When Harger got within 50 feet of appellant, appellant ran across the street. Harger got out of his car and pulled his service weapon, commanding appellant to stop and get on the ground. Appellant slowed to a brisk walk and continued to move away as he talked on a cell phone. Harger told appellant to get on the ground or he would deploy his dog.

A white Mustang approached from the opposite direction and made a three-point turn. Appellant ran toward the car and dove head first into the front passenger window. Officer Harger was able to block the Mustang with the assistance of other responding

[1] At trial, the witness testified that he did not recall seeing a man running down 16th Street or testifying to that fact at appellant's preliminary hearing, nor did he recall what he said to police at the scene. He acknowledged he did not want to be in court.

police cars, at which point appellant got out and started to run. Harger deployed his police dog, which bit appellant. Another officer jumped on appellant, who continued to struggle, but eventually appellant was tasered, subdued and arrested. The officers also detained the two men in the Mustang, Wilson Lee and Kenneth Cisne.

Police searched the area for evidence and found a handgun in a trash can on the curb of 16th Street, in a location about 385 feet from the Club Q front door. The spot where Officer Harger had first seen appellant on 16th Street was another 521 feet up 16th Street away from the club. The gun, which contained nine rounds of ammunition including one round that was chambered, was registered to a man who had reported it stolen the previous month.

A .40-caliber shell casing found in front of Club Q was examined by a criminalist and was determined to have been fired from the gun discovered in the trash can. An expert on gunshot residue analysis examined samples taken from appellant's hands and identified one particle "highly specific" to and three particles "consistent" with gunshot residue. In the expert's opinion, this meant that appellant had either discharged a firearm, had come in contact with a gun, or had been in a location two to 14 feet away from where a gun was discharged. No gunshot residue was found on Wilson Lee or Kenneth Cisne.

Contact DNA samples were taken from the trigger and grip of the gun recovered from the garbage can. Although there were at least three contributors to the grip sample, the criminalist who conducted the analysis concluded that appellant could be one of the contributors. There were at least two DNA contributors to the trigger sample, and appellant could not be excluded as one of those contributors. The probability that a random person would have the same genetic markers reflected in appellant's DNA and that on the trigger was one in 2.6 trillion among Caucasians and one in 380 billion among Hispanics. Appellant is Hispanic.

E.M., a friend of Walter McDuffie's, was called as a witness for the defense. On the night McDuffie was killed, E.M. saw him at the club and the two men embraced. E.M. testified that he heard a gunshot and saw "black people with dreads, everybody running out." Asked whether he had seen appellant, E.M. responded, "I know that he

[appellant] wasn't by that door, that's what I know . . . I don't know where the shooter was but I know he wasn't right there by that door. I know it was the majority Black people right there." E.M. had not told the police about this group of African Americans when he was interviewed after the shooting, and he did not come forward with the information even though he had heard "through the streets" that the person charged with the shooting was "a Mexican." He had met with defense counsel two or three times not long before the trial.

Appellant testified that on the night of the shooting, he had been driven to Club Q by Cisne in a white Mustang. He denied shooting McDuffie. He had a gun with him, but left it underneath the passenger seat of the Mustang because he knew security would be checking for weapons at the club. Appellant claimed to have been inside at the bar when a shot was fired, after which he went outside to see who had been shot. When he noticed the police, he ran in the opposite direction down 16th Street because he had warrants out for his arrest. He tried to call his child's mother on his cell phone to pick him up, but as he was walking down the street he saw Cisne drive by and crossed the street to get his attention. Appellant saw the police and thought he was going to jail so he attempted to get inside Cisne's car but could not do so because the passenger, Lee, had a drink in his lap. Appellant got out and was bitten by a police dog, tasered, and arrested.

No gun was discovered inside the Mustang.

DISCUSSION

I. *Batson/Wheeler Motion*

As explained in *Batson* and *Wheeler*, both the state and federal Constitutions bar peremptory challenges that are based on a juror's race or membership in a similar cognizable class. (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*); *Batson*, *supra*, 476 U.S. at p. 97 [violation of federal equal protection clause]; *Wheeler*, *supra*, 22 Cal.3d at pp. 276–277 [violation of right to jury drawn from representative cross-section of community].) A *Batson/Wheeler* challenge does not require that the defendant and the excluded jurors be members of the same group. (*People v. Davis* (2009) 46 Cal.4th 539, 583; *People v. Hayes* (1999) 21 Cal.4th 1211, 1283-1284, citing *Powers v. Ohio* (1991)

499 U.S. 400, 415-416.) Appellant argues that the judgment must be reversed because the prosecutor used a peremptory challenge to excuse an African American prospective alternate juror on racial grounds. We disagree.[2]

A. *Background*

During jury selection, the prosecutor used peremptory challenges to excuse three African American jurors. The first, Juror R.-R., had expressed doubts about her ability to sit as a juror on the case and had said she would need to be 100 percent certain before she could return a verdict of guilt. The second, Juror Wr., had been arrested for assault about two years before the trial, and commented during voir dire that the police often abuse their power. The third, Juror W., was a youthful woman who had recently had a baby and was in her junior year of college at U.C. Davis studying psychology. She had taught preschool for four years. Her mother was a civilian clerk for the sheriff's department and her brother had been prosecuted for driving under the influence but, she believed, had been treated fairly. Juror W. had previously sat as a juror in a criminal case involving a "pedophile" in which the jury had reached a verdict.

The prosecutor used peremptory challenges to excuse Jurors R.-R. and Wr. without objection by the defense. He initially passed on a jury panel that included Juror W. as an alternate juror, but used a peremptory challenge to excuse her after other prospective jurors [including a Juror H.] were seated and questioned. Defense counsel objected on *Batson/Wheeler* grounds, arguing that there was no reason for the prosecution to have challenged Juror W. other than her race. Defense counsel conceded that there were potential legitimate reasons for the prosecutor's peremptory challenges against Jurors R.-R. and Wr.

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[2] In cases where no alternate juror is substituted in to hear the case, an alleged *Batson/Wheeler* violation as to a prospective alternate may be deemed harmless error. (See *People v. Mills* (2010) 48 Cal.4th 158, 182; *People v. Roldan* (2005) 35 Cal.4th 646, 703, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Here, an alternate juror was substituted in to hear the case after one of the regular jurors was excused for cause during deliberations, so we consider the substance of appellant's claim.

The trial court found a prima facie case of discrimination as to Juror W. and asked the prosecutor to state his reasons for excusing her. The prosecutor responded, "With respect to [Juror W.], she, in my view, is similarly situated with [Juror H.] And had they been switched I would have done the same thing. She's a college kid. [¶] She is very young. Lacks life experience. She has expressed an interest majoring in psychology because she wants to work with people. People in those types of fields typically favor the defense in criminal cases, not always, but that has been the trend, and I believe the cases say that is a justifiable reason in and of itself for excusing a juror." The prosecutor also noted that another African American remained on the jury panel and that he had no intention of excusing that juror.

The trial court found the prosecutor's reasons to be bona fide and denied the *Batson/Wheeler* motion: "The bottom line is I credit [the prosecutor's] explanations. There is really no actual dispute as the to the legitimacy of the explanations as to [Jurors R.-R. and Wr.]. I think they are both legitimate and sincere. [¶] As to [Juror W.], I think it is a closer call, but I do credit [the prosecutor's] explanation that it is his view that her youth and choice to – of professions and education, while I may not agree with the inference, I am not saying – I don't – I'm saying that reasonable people can disagree as to whether someone of her age or someone who chooses psychology and wishes to work with children is a good or bad juror for the People, but the point is it is a legitimate perception or conclusion from her age and her choice of profession, and I don't think that the exercise of the challenge as to [Juror W.] was based on her race. [¶] So I credit [the prosecutor's] reasons, I find they are race neutral and I find they are sincere, they are the actual reasons he did challenge [Juror W.] [¶] I have considered the comparative analysis and don't think there is anybody on our jury who is of a similar age or who has majored in psychology that the People did not challenge." The court also noted that an African American remained on the jury panel as a potential alternate.

The prosecutor later exercised a peremptory challenge against Juror H., whom he had cited as "similarly situated" to Juror W. in terms of youth and life experience. Juror H. was a junior in college who had recently worked as a retail clerk for a year. The jury

as finally constituted included the remaining African American panelist as an alternate juror, who was substituted in to hear the case after a regular juror was excused for cause during deliberations.

B. *Analysis*

A defendant who suspects that a juror has been challenged for a racially discriminatory reason must raise an objection (commonly known as a *Batson* or *Wheeler* motion) at which point the trial court will employ a familiar three-step analysis: "First, [it] must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination." (*Lenix*, *supra*, 44 Cal.4th at p. 612.) Here, the trial court found that a prima facie case of discrimination had been made as to Juror W., meaning that our focus is on the third stage of the *Batson/Wheeler* analysis and whether the defense had proved the ultimate issue of a discriminatory motivation for the peremptory challenges.

We review the court's ruling on purposeful racial discrimination for substantial evidence, giving deference to the trial court's ability to distinguish "bona fide reasons from sham excuses." (*People v. Burgener* (2003) 29 Cal.4th 833, 864; see also *People v. Watson* (2008) 43 Cal.4th 652, 671; *People v. McDermott* (2002) 28 Cal.4th 946, 971.) "As long as the court makes 'a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 541; see also *Lenix*, *supra*, 44 Cal.4th at p. 626; *Snyder v. Louisiana* (2008) 552 U.S. 472, 477 (*Snyder*).) "The best evidence of whether a race-neutral reason should be believed is often 'the demeanor of the attorney who exercises the challenge,' and 'evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." ' " (*People v. Stevens* (2007) 41 Cal.4th 182, 198.) "The ultimate burden of

persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Lenix*, at pp. 612–613.)

Substantial evidence supports the trial court's determination that Juror W. was excused for the nondiscriminatory reasons articulated. Youth and limited life experience are permissible, race-neutral reasons for exercising a peremptory challenge. (*People v. Sims* (1992) 5 Cal.4th 405, 429-430; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328.) The prosecutor described Juror W. as "very young" and "a college kid," a characterization that is neither contradicted by the record nor inherently implausible. Significantly, after the *Batson/Wheeler* motion was denied, the prosecutor excused Juror H., a non-African American juror who was also young and a junior in college.

The prosecutor also noted that Juror W. was studying psychology, a field that tends to favor criminal defense. This, too, is a permissible reason for excluding a potential juror. (*People v. Landry* (1996) 49 Cal.App.4th 785, 790 [prosecutor properly excused juror with background in psychology or psychiatry because he had had "bad experiences" with such jurors]; see also *People v. Clark* (2011) 52 Cal.4th 856, 907 (*Clark*) [juror's completion of psychology classes in college was race-neutral reason for peremptory challenge]; *People v. Lewis* (2008) 43 Cal.4th 415, 476-478 [record supported prosecutor's explanation that correctional counselor's extensive background in psychology would make her less likely to vote for death penalty]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394 [prosecutor excluded kindergarten teacher due to belief that such professionals are liberal and not prosecution-oriented].)

Appellant points out that Juror W. had four years of experience as a preschool teacher and had recently had a child. This does not render the prosecutor's explanation implausible. Certainly, four years of teaching preschool is life experience, but this does not mean that on balance, it is the type of life experience that the prosecutor was looking for in a juror. "The party seeking to justify a suspect excusal need only offer a genuine, reasonably specific, race- or group-neutral explanation related to the particular case being tried. [Citations.] The justification need not support a challenge for cause, and even a

'trivial' reason, if genuine and neutral, will suffice. [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 136.)

Appellant also argues that the prosecutor's reasons were lacking in sincerity because non-African American jurors who were seated had some of the same characteristics as Juror W. We are not persuaded. It is true that some of the seated jurors had children or similar work experience, but none of them had majored in psychology or were as youthful as Juror W. For example, one juror was a housewife with children ranging in age from 17 to 23; one had young children, but had been employed for 18 years as an insurance agent; one had an 11-year old child but had been employed for eight years as a teacher; and one was a nurse who had over six years of work experience. Substantial evidence supports the trial court's conclusion, based in part on a comparative analysis of the seated jurors, that the prosecutor excused Juror W. for race-neutral reasons. We defer to that conclusion. (*People v. Riccardi* (2012) 54 Cal.4th 758, 793.)

It is also significant, though not dispositive, that the jury as finally constituted included an African American alternate juror, even though the prosecution had peremptory challenges remaining. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 734; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1053–1054; *Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1429.) That juror, as previously noted, was substituted in to hear the case after one of the regular jurors was excused. We may "rel[y] on the fact that the government waived available strikes and permitted members of a racial minority to be seated on a jury to support a finding that the government did not act with discriminatory intent in striking another member of the same minority group." (*United States v. Canoy* (7th Cir.1994) 38 F.3d 893, 900, and cases cited therein.)

II. *Jury Misconduct and Bias Issues*

Appellant raises a number of claims relating to alleged jury misconduct and bias. We conclude that none require reversal of the judgment.

A. *Background*

Juror No. 6 sent a note during deliberations indicating that he could no longer be impartial. When the court brought him into chambers with counsel to inquire about his

reasons, he gave ambiguous answers that suggested he had "inferred that some of the people connected with this case have gang involvement and that he has concluded that he cannot be fair as a result." Although neither side had presented gang evidence as part of the case, the People's exhibits included a photograph of Kenneth Cisne showing his facial tattoos. The court excused Juror No. 6 for cause with no objection by counsel and replaced him with an alternate juror.

Later in the deliberations, the jury foreperson sent the following note, "This is to inform you that members of the jury have expressed a concern relative to their safety after we have reached and tendered a verdict." The court discussed the note with counsel, and the prosecutor stated, "I think it's important to note through most of this trial there have been friends and family members of the defendant that have been present in large numbers. A large percentage of that group are and were young men. And I'm not here to claim that they were gang members or that they were, for lack of a better term, mean-mugging the jurors or anything like that, but there was a large number of people here. [¶] The case itself, just based on the tattoos on Mr. Cisne's face would lead a reasonable person to conclude that perhaps there was a gang element to this case, although no evidence of gang membership was presented during the course of the trial. [¶] In my view, the reasonable interpretation of the note is that the jury was concerned for their safety upon delivering a guilty verdict of some sort just based on the presence of those people in the courtroom and the nature of the case."

When questioned individually by the trial court in the presence of both counsel and the defendant, the foreperson explained that Juror No. 2 had asked "what, if anything, would be done as part of the conclusion of the trial for the jurors," and that Juror No. 4 had reported seeing a witness escorted to a his car by a person she believed to be an armed police officer. The court brought Juror No. 4 in for individual questioning and she explained that she had seen a witness escorted to his car by an armed person (whom counsel identified an investigator from the District Attorney's office). She said she was "very confident," however, that this did not affect her decision in the case.

After Juror No. 4 left the courtroom, defense counsel commented that she had "blinked" when asked whether her deliberations had been affected, suggesting she had not been truthful in her response. The court disagreed that the juror was untruthful, noting that she had appeared nervous throughout the trial, and the foreperson was called back into the courtroom for further individual questioning. Asked whether Juror No. 4's observation of the witness escort was discussed as evidence in the case or had any effect on deliberations, the foreperson stated, "I don't believe that it had any impact."

Based on these interchanges, the court concluded that Juror No. 4's comment about the witness's escort did not influence the jury deliberations. Defense counsel asked the court to call the other jurors in for individual questioning, rather than relying on the foreperson's observations, but the court declined to do so. The jury immediately returned a verdict convicting appellant of second degree murder.

Defense counsel filed a post-trial petition for access to the jurors' sealed personal contact information, pursuant to Code of Civil Procedure section 237, subdivision (b). The court served the jurors with notice of a hearing on the petition and a questionnaire asking whether they objected to the release of that information. Eight jurors responded in writing and objected to disclosure.

Juror No. 5, the foreperson, advised that "several of the jurors on this trial expressed concern for their personal safety . . . myself included. For this reason I would not release juror specific personal information." Juror No. 7 sent a letter expressing "strong objections" to the release of any information, explaining that, because of the "brutal nature of the crime, I am extremely concerned about my personal safety should this information become known to the convicted felon, or his associates, who were often present in the courtroom during the trial. . . . [¶] I realize that the defense attorney is alleging there was jury misconduct as he explores every available angle to represent his client, but I saw no untoward behavior in the jury room." Juror No. 9 responded, "I noticed that during the jury trial, some of defendant's friends/relatives were staring hard at me with a mean look. I felt very uncomfortable and scared. During the recess or when I would go to my parked car, especially on the last day of trial, I was so scared that I

almost peed in my pants." Juror No. 12 wrote, "No one in the courtroom audience influenced my verdict or decision in this case. . . . I do not wish to be contacted nor do I wish any of my contact information to be released to the public. I believe, as [defense counsel] stated that this crime was committed to set an example and am concerned that gang affiliations [sic] may try to avenge his conviction."

At the hearing on the petition for access to juror contact information, Juror No. 10 personally appeared to object to disclosure, bringing to nine the number of jurors opposed. The court concluded that the defense had failed to establish good cause for disclosure and denied the petition.

Defense counsel filed a motion to compel the jurors to attend a confidential evidentiary hearing, along with motion for new trial, arguing that the written objections to the petition for access to juror contact information had established bias and juror misconduct. The court denied both motions.

B. *Sufficiency of Court's Inquiry During Deliberations*

Appellant argues that the court should have taken additional steps to investigate possible juror misconduct and bias after it received the foreperson's note during deliberations, because the information then before the court suggested bias due to fears relating to appellant's apparent gang affiliation. We reject the claim.

"An accused has a constitutional right to a trial by an impartial jury. [Citations.] An impartial jury is one in which no member has been improperly influenced [citations] and every member is ' "capable and willing to decide the case solely on the evidence before it" ' [citations]." (*In re Hamilton* (1999) 20 Cal.4th 273, 293-294 (*Hamilton*).) "A sitting juror's involuntary exposure to events outside the trial evidence, even if not 'misconduct' in the pejorative sense, may require. . . examination for probable prejudice." (*Id*. at pp. 294–295.) A trial court has a duty to inquire into allegations of misconduct or bias during jury deliberations and conduct whatever inquiry is reasonably necessary to determine whether a juror should be discharged. (Pen. Code, § 1120; *People v. Martinez* (2010) 47 Cal.4th 911, 941-942 (*Martinez*); *People v. Ledesma* (2006) 39 Cal.4th 641, 738.)

That said, " 'not every incident involving a juror's conduct requires or warrants further investigation. "The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court." ' [Citations.] ' "[A] hearing is required only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case." ' [Citation.]" (*Martinez*, *supra*, 47 Cal.4th at p. 942; *People v. Dykes* (2009) 46 Cal.4th 731, 809-810 (*Dykes*).) A defendant is not entitled to such a hearing as a matter of right. (*Dykes*, at p. 809.) The decision of whether and how to investigate allegations of juror misconduct rests within the trial court's sound discretion. (*People v. Engelman* (2002) 28 Cal.4th 436, 442.)

In this case, the jury foreperson sent the court a note indicating that certain jurors had expressed a concern about their safety upon return of the verdict. The court pursued this information by asking the foreperson about the circumstances that had prompted the note. It learned that one juror (No. 2) had wondered aloud what steps would be taken for their security when the verdict was returned, and that another (No. 4) had mentioned seeing a prosecution witnesses escorted to his car by someone who was armed. The court questioned the foreperson and Juror No. 4 individually, both of whom assured the court that the matter of the escorted witness had not entered into the jury's deliberations.

When assessing whether the trial court abused its discretion by failing to directly question Juror No. 2 about his comment regarding security, we are guided by the decision in *People v. Brown* (2003) 31 Cal.4th 518. In that case, all twelve jurors expressed concerns that the defendant's gang would retaliate against them after they returned a death penalty verdict. (*Id*. at pp. 581-582.) The Supreme Court concluded that this did not require a hearing because the defendant had failed to demonstrate " 'a strong possibility that prejudicial misconduct had occurred.' " (*Id*. at p. 582.) In the present case, Juror No. 2's comment about his security concerns "appear[] to reveal [his] honesty in conveying what someone in [his] position might feel, rather than a bias against

defendant or an inability to fulfill [his] duties as a juror." (*People v. Farnam* (2002) 28 Cal.4th 107, 142 (*Farnam*).)

As for Juror No. 4's statement that she had seen a witness being escorted to his car, the issue is not whether this disclosure created some safety concerns on the part of some jurors, but whether any such concerns were likely to have influenced the decisionmaking process. In *Hamilton, supra*, 20 Cal.4th 273, the court rejected a claim that the potential for bias required reversal where a sitting juror in a capital case believed she had seen the defendant's sister and her boyfriend in a car parked in an alley beside the juror's home. The court concluded that even if the incident was construed as an improper attempt to intimidate the juror, "the objective circumstances give rise to no substantial likelihood that the encounter resulted in [the juror's] actual bias." (*Hamilton, supra*, 20 Cal.4th at p. 306.) Here, the court questioned the foreperson and Juror No. 4 and satisfied itself that the information about the witness escort did not affect the deliberations. The trial court was in the best position to evaluate the credibility of those jurors, and we defer to its determination. (See *People v. Harris* (2008) 43 Cal.4th 1269, 1305.)

Nor do we agree that the court abused its discretion when it decided against questioning each juror individually. Deliberations were ongoing, and the court was properly concerned that the act of questioning jurors about their mental processes could affect those deliberations. (See *People v. Thompson* (2010) 49 Cal.4th 79, 137; *People v. Cleveland* (2001) 25 Cal.4th 466, 478.) Asking the others about Juror No. 2's security concerns, or Juror No. 4's observation of what she believed to be an armed escort, could have only called attention to these concerns and would have risked spreading them throughout the jury. (See *People v. Navarette* (2003) 30 Cal.4th 458, 500.)

C. *Denial of Petition for Access to Juror Contact Information*

Appellant claims the trial court should have granted his petition for the disclosure of juror contact information so that he could further develop his claims of jury misconduct. We disagree.

Following a jury verdict in a criminal proceeding, the court's record is "sealed," meaning all "personal juror identifying information of trial jurors. . . consisting of names, addresses, and telephone numbers," is extracted or otherwise removed from the court record. (Code Civ. Proc., § 237, subds. (a)(2)–(3).) Code of Civil Procedure section 206, subdivision (g), allows a defendant to petition the court for access to juror identifying information "for the purpose of developing a motion for new trial." Code of Civil Procedure section 237, subdivision (b) provides, "The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information."

The procedure for obtaining juror contact information set forth in Code of Civil Procedure sections 206 and 237 is designed "to balance the interests of providing access to identifying juror information for a particular, identifiable purpose against the interests in protecting the jurors' privacy, safety, and well-being, as well as the interest in maintaining public confidence and willingness to participate in the jury system." (Stats. 1995, ch. 964, § 1, p. 7375.) "Absent a satisfactory, preliminary showing of possible juror misconduct, the strong public interests in the integrity of our jury system and a juror's right to privacy outweigh the countervailing public interest served by disclosure of the juror information. . . ." (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552; see *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1093-1095; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 990.) We review an order denying a petition under section 237 under the deferential abuse-of-discretion standard. (*Townsel*, at p. 1097.)

The defense petition under Code of Civil Procedure section 237 focused on Juror No. 4's observation of a witness being escorted away from the courthouse by someone who was armed, and the possible effect this might have had on juror deliberations. The court found no good cause for unsealing the jurors' contact information, noting that it had already investigated this issue by questioning Juror No. 4 and the jury foreperson. As previously explained, the trial court reasonably concluded that Juror No. 4's observation of the witness being escorted had not affected the jury's deliberations. The petition for access to contact information did not present the court with any new information

concerning this issue, and the court did not abuse its discretion in rejecting appellant's attempt to develop a claim of juror misconduct that had been previously rejected.

Moreover, defense counsel stated in a supporting declaration that after the verdict, "I stood outside the courthouse in an attempt to converse with any juror that was willing to discuss the case, and although I saw every juror, no jurors spoke with me." This is consistent with the views of the nine jurors who responded to the notice of the hearing under Code of Civil Procedure section 237, all of whom opposed disclosure of their contact information. "[A] juror's refusal to discuss the deliberations or verdict is a 'compelling governmental interest' sufficient to authorize the court to keep that juror's address and telephone number sealed." (*Jones v. Superior Court* (1994) 26 Cal.App.4th 1202, 1209.)

D. *Motion for New Trial*

Appellant claims the court should have granted his motion for new trial because several jurors who responded to the notice of the hearing under Code of Civil Procedure section 237 said they did not want their information disclosed due to the gang overtones in this case. According to appellant, this shows the jurors considered his possible gang involvement when reaching their verdict, which, like Juror No. 4's comment about the armed escort, was not a matter in evidence.

"To challenge the validity of a verdict based on juror misconduct, a defendant may present evidence of overt acts or statements that are objectively ascertainable by sight, hearing, or the other senses. (*People v. Danks* (2004) 32 Cal.4th 269, 302, []; Evid.Code, § 1150, subd. (a).) No evidence may be presented concerning the subjective reasoning processes of a juror that can neither be corroborated nor disproved; rather, the effect of any misconduct is evaluated based on an objective standard of whether there is a substantial likelihood of juror bias." (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1116; see also *Hamilton, supra,* 20 Cal.4th at p. 294.)

Appellant's motion for new trial was accompanied by no evidence of overt acts or statements by jurors suggesting that appellant's possible gang involvement contributed to the verdict. The individual statements by some jurors that they did not want personal

information disclosed due to this apparent gang affiliation does not suggest misconduct or bias in the deliberative process. The jurors were instructed to "determine what facts have been proved from the evidence received in the trial and not from any other source." (CALJIC No. 1.00.) Nothing in appellant's motion suggests the jury did not follow this instruction.

Appellant argues that the jurors' reference to appellant's gang involvement must be presumed prejudicial. (*People v. Nesler* (1997) 16 Cal.4th 561, 578-579.) Because the motion for new trial did not make a sufficient showing of juror misconduct, and did not establish a substantial likelihood that any juror was impermissibly influenced, there is no presumption of prejudice.

III. *Prosecutorial Misconduct*

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution "when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." '" " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' " (*People v. Hill* (1998) 17 Cal.4th 800, 819; see also *People v. Vines* (2011) 51 Cal.4th 830, 873.) Appellant argues that the judgment must be reversed based on two instances of prosecutorial misconduct during his trial. We disagree.

A. "Doyle" *Error*

The first alleged instance of misconduct stems from appellant's statement, during cross-examination, that he had invoked his constitutional right to remain silent after initially waiving that right and speaking to officers. He argues that this testimony was elicited in violation of *Doyle v. Ohio* (1976) 426 U.S. 610, 618-619 (*Doyle*). We disagree.

The issue arises in the following context: After his arrest, appellant was advised of his rights under *Miranda*, *supra*, 384 U.S. 436 and agreed to speak with police. He

claimed that he had been inside the club but had not heard any shots and was just trying to call his girlfriend for a ride when he was picked up by police. He eventually invoked his right to remain silent and the interview ceased. The tape of his police interview was played for the jury at trial, though his invocation of his *Miranda* rights was excised.

During cross-examination, appellant claimed that he lied to police officers during his interview because he was scared and did not know how to respond to them. The prosecutor began questioning appellant about other interviews with police in his prior felony cases, making the point that appellant was not a novice when it came to law enforcement. Defense counsel objected and during a chambers conference stated that he was concerned the prosecution would be using the prior convictions as evidence of criminal propensity (when they were admissible solely as impeachment) and would elicit a reference to appellant's invocation of his right to silence.

The prosecutor continued to cross-examine appellant about false statements made to police during the interrogation: "Q: Sir, did you have any problem understanding [the Detective] when he spoke with you that night? [¶] A: No. [¶] Q: You understood the words he used and the messages he was conveying to you, right? [¶] A: Yes. [¶] Q: He didn't trick you in any way, did he? [¶] A: No. [¶] Q: He asked you pretty straightforward questions, right? [¶] A: Yes. [¶] Q: Questions like where were you, where did you come from, what were you doing, that sort of thing, right? [¶] A: Right. [¶] Q: And at the end of the interview before you got into the substance of the actual incident it's fair to say that he advised you that you had the right to remain silent, right? [¶] A: Yes. [¶] Q: And when he advised you of that right you understood that, didn't you? [¶] A: Yes. [¶] Q: And yet you still [chose] to speak with [the detective], right? [¶] A: I think so, yes. [¶] Q: You think so. You did, right? [¶] A: Yeah, yes, I don't really remember. Yes. [¶] Q: And when you spoke to him you were deceptive at different points during the interview[,] right? [¶] [Defense counsel]: This has been asked and answered. [¶] The Court: I'm going to permit it. Overruled. [¶] A: I don't—wasn't thinking that it was deceptive there. I mean, I knew what the investigator was going to be getting at. I didn't want to be—I didn't want to be a part of the investigation. [¶] So I

was scared about that, you know, I didn't know what was going on, and I did tell him that I wanted to exercise my rights. I did tell him that."

Defense counsel objected and the court held a chambers conference, during which counsel complained that the prosecution had elicited testimony about appellant's invocation of the right to silence. The court disagreed that the prosecutor's question had called for the answer given by appellant, and offered to instruct the jury to disregard that answer. Defense counsel declined the offer.

Under *Doyle, supra*, 426 U.S. at pp. 616-620, it is a violation of due process to use a defendant's post-*Miranda* silence for impeachment purposes. The use of such post-arrest silence is fundamentally unfair, because the warnings under *Miranda* implicitly assure a defendant that his silence will not be used against him. (*People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1555.) Here, the prosecutor did not intentionally elicit the evidence that appellant had invoked his *Miranda* rights; rather, appellant volunteered that information while being questioned about the deceptive statements he made to police before invoking those rights. Although a prosecutor must warn his or her own witnesses against referring to inadmissible matter during their testimony, this duty does not extend to defense witnesses—and certainly not to the defendant himself. (See *People v. Lucero* (2000) 23 Cal.4th 692, 718 [no *Doyle* error when police officer called by the defense to testify about defendant's demeanor during an interview mentioned that he had invoked his right to silence].) The prosecutor did not commit misconduct based on *Doyle* error.

B. *Remarks During Closing Argument about E.M.'s Testimony*

E.M., a friend of the victim's, testified that even though he did not see the shooter, he believed he was an African American because he saw a group of African Americans with dreadlocks standing behind the victim. During closing argument, the prosecutor pointed out that when E.M. gave a videotaped statement to police, he did not provide this information or describe the likely shooter. The prosecutor continued, ". . . there is really something serious going on here. It sounds like he [E.M.] has been influenced by the defense, if you really think about it."

Appellant argues that this comment was unsupported by any evidence and unfairly denigrated defense counsel by suggesting that counsel had fabricated evidence. (See *Clark, supra*, 52 Cal.4th at p. 961 [prosecutor is not permitted to make false or unsubstantiated claims that a defense attorney is fabricating a defense or deceiving a jury].) No objection was made to the prosecutor's remark and the issue has been forfeited on appeal. (*Farnam, supra*, 28 Cal.4th at p. 167.)

Appellant alternatively argues that his trial attorney provided ineffective assistance of counsel in failing to object, but this claim fails as well. A claim of ineffective assistance requires both deficient performance by counsel under an objective standard of professional performance and prejudice amounting to a reasonable probability that counsel's actions (or lack thereof) had an adverse effect on the outcome of the trial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Waidla* (2000) 22 Cal.4th 690, 718.) "If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069.) Here, defense counsel might have foregone an objection because he chose not to highlight the brief remark. (See *People v. Wharton* (1991) 53 Cal.3d 522, 567.) We cannot say on this record that his performance was ineffective.

IV. CALJIC No. 2.23—*Prior Convictions for Impeachment*

While testifying on his own behalf, appellant admitted that he had been previously convicted of possession for sale of methamphetamine, being a felon in possession of a firearm, and felony spousal battery. The court also took judicial notice of these convictions. Appellant argues that the jury should have been specifically instructed to consider these prior convictions solely for the purpose of impeaching his credibility, and not as proof of criminal disposition or bad character.

The jury was instructed with CALJIC No. 2.23 regarding the effect of a prior felony conviction on the believability of a witness: "The fact that a witness has been convicted of a felony, if this is a fact, *may be considered by you only for the purpose of*

determining the believability of that witness. The fact of a conviction does not necessarily destroy or impair a witness's believability. It is one of the circumstances you may consider in weighing the testimony of that witness." (Italics added.) If appellant wanted a more specific instruction explicitly stating that the convictions were not relevant to criminal propensity, it was incumbent upon him to request the clarifying language: "[A] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate amplifying, clarifying, or limiting language." (*People v. Farley* (1996) 45 Cal.App.4th 1697, 1711.)

Courts have recognized that a limiting instruction on the effect of a prior conviction, while not usually required sua sponte, might be required in the "occasional extraordinary case" in which the prior convictions formed "a dominant part of the evidence against the accused." (*People v. Collie* (1981) 30 Cal.3d 43, 63-64.) We reject appellant's suggestion that this is such a case, as his prior convictions were not particularly inflammatory relative to the charged offense and constituted a very minor part of the evidence. In any event, CALJIC No. 2.23 *was* given and advised the jury that the prior convictions were admitted solely on the issue of credibility, even if it did not specifically refer to criminal propensity as a prohibited use of the evidence.

V. *CALJIC No. 2.52—Flight Instruction*

The trial court gave CALJIC No. 2.52, regarding the effect of flight after a crime: "The attempted flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide." Appellant argues that this instruction violated his right to due process and a fair trial "by erecting an irrational permissive inference of guilt of murder" and "improperly reducing the People's burden of proof on identification."

Appellant has forfeited this claim by failing to object to the flight instruction. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260 (*Virgil*).) Nor could he prevail on the

merits. "In general, a flight instruction 'is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.' " (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) The evidence showed that appellant ran down 16th Street, away from the scene of the shooting, refused to stop when ordered by the police, and attempted to flee in an associate's car before being tasered, bitten by a police dog, and apprehended. By appellant's own admission, he fled the scene of the shooting because he was concerned about his warrants. The evidence of flight was strong and CALJIC No. 2.15 was supported by the evidence.

As to appellant's claims that the instruction violates due process, creates an unconstitutional permissive inference, and reduces the burden of proof, our Supreme Court disagrees. (*People v. Mendoza* (2000) 24 Cal.4th 130, 180.) Nor does it matter that identity was at issue: "If there is evidence identifying the person who fled as the defendant, and if such evidence 'is relied upon as tending to show guilt,' then it is proper to instruct on flight. ([Pen. Code] § 1127c.) 'The jury must know that it is entitled to infer consciousness of guilt from flight and that flight, alone, is not sufficient to establish guilt. [Citation.] The jury's need to know these things does not change just because identity is also an issue. Instead, such a case [only] requires the jury to proceed logically by deciding first whether the [person who fled] was the defendant and then, if the answer is affirmative, how much weight to accord to flight in resolving the other issues bearing on guilt. The jury needs the instruction for the second step.' " (*People v. Mason* (1991) 52 Cal.3d 909, 943.)

VI. *CALJIC No. 2.21.2—Witness Willfully False*

The court gave CALJIC No. 2.21.2, which advised the jury: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." Appellant argues that the instruction violates

due process because it allows dispositive credibility issues to be resolved under a probability standard, rather than by proof beyond a reasonable doubt.

Appellant has again forfeited this claim by failing to object. (*Virgil*, *supra*, 51 Cal.4th at p. 1260.) In any event, as he acknowledges, his argument has been rejected by the California Supreme Court. (*People v. Nakahara* (2003) 30 Cal.4th 705, 714; see also *People v. Friend* (2009) 47 Cal.4th 1, 53.) We are bound to follow these authorities. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

VII. *CAJIC No. 2.90—Reasonable Doubt*

Appellant argues that the definition of reasonable doubt contained in CALJIC No. 2.90 amounted to structural error because the standard it conveys is more akin to a standard of clear and convincing evidence: "Reasonable doubt is defined as follows: it is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." As appellant acknowledges, *People v. Freeman* (1994) 8 Cal.4th 450, 504 requires the rejection of this claim.

VIII. *Cumulative Error*

Appellant argues that the cumulative effect of errors in this case require reversal even if they are not prejudicial on an individual basis. Because none of appellant's arguments establish error, there is no prejudice to cumulate. (*People v. Beeler* (1995) 9 Cal.4th 953, 994; see also *People v. Wrest* (1992) 3 Cal.4th 1088, 1111.)

DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.